No. 09-1262

IN THE

Supreme Court of the United States

PRESBYTERIAN CHURCH OF SUDAN, ET AL.,

Petitioners,

v.

TALISMAN ENERGY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW SCHOLARS WILLIAM ACEVES, PHILIP ALSTON, M. CHERIF BASSIOUNI, DOUGLASS CASSEL, ROGER S. CLARK, DAVID M. CRANE, JOHN DUGARD, RICHARD GOLDSTONE, VED NANDA, SHERI ROSENBERG, LEILA NADYA SADAT, PATRICIA VISEUR SELLERS, DINAH SHELTON, BETH STEPHENS, BETH VAN SCHAACK, AND DAVID WEISSBRODT IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioners.[1] *Amici* (listed in Appendix A) are professors of international law and human rights law, and international jurists who have served as judges and experts on international bodies. Their work has been cited by federal courts for guidance in determining the content of international law in domestic proceedings, including under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.

Amici submit this brief to advise the Court that under customary international law, the *mens rea* standard for aiding and abetting liability is, and always has been, *knowledge*.[2] This Court should grant certiorari to correct the decision of the court below, which rests on a fundamental misinterpretation of the standard for aiding and abetting liability under

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amici*'s intention to file this brief. The parties have consented to the filing of this brief, and such consents have been lodged with the Court.

No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] *Amici* take no position on whether federal common law or customary international law provides the standard for aiding and abetting liability in ATS cases, but note that this question alone is worthy of certiorari. *Amici* assume *arguendo* that international law applies and describe the international law standard.

customary international law. In adopting a *mens rea* of purpose, the Second Circuit disregarded and departed from sixty years of jurisprudence and applied a standard in direct conflict with other circuit decisions, *see, e.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158-59 (11th Cir. 2005); *Doe v. Unocal*, 395 F.3d 932, 950-51 (9th Cir. 2002), *vacated by grant of en banc review*, 395 F.3d 978 (9th Cir. 2003). *Amici* offer this Court particular expertise and wish to clarify that neither purpose nor specific intent are, or have ever been, the accepted standard.

SUMMARY OF ARGUMENT

Under customary international law, aiding and abetting liability requires that an accused knowingly provide substantial assistance to the tortfeasor. This rule has been recognized at least since the post-World War II military tribunals and endures in modern decisions of the international criminal tribunals, which were mandated specifically to apply customary international law.

Analysis of Nuremberg-era jurisprudence confirms that knowledge was the standard applied, leading to both convictions and acquittals. *See, e.g.*, *Trial of Bruno Tesch and Two Others* (*The Zyklon B Case*), 1 Law Reports of Trials of War Criminals 93, 101 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) (convicting two industrialists who supplied poison gas to Nazis because they "knew" that it would be used to kill concentration camp prisoners); *United States v.*

Von Weizsaecker (The Ministries Case), 14 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 308, 478, 621-22, 784, 854 (1949) (applying a *mens rea* of knowledge to all defendants but acquitting one whose actions did not meet the *actus reus* requirement). The standard that emerged at Nuremberg has been consistently adopted in the intervening decades by international tribunals, including those for the Former Yugoslavia and Rwanda. *See, e.g.*, *Prosecutor v. Furundžija*, Case No. IT-95-17/1/T, Judgment, ¶ 236 (Dec. 10, 1998).

The court below relied on the Rome Statute of the International Criminal Court ("ICC"), July 17, 1998, 2187 U.N.T.S. 3, and a misconception of the Nuremberg-era cases, to reach the erroneous conclusion that the *mens rea* standard for aiding and abetting liability under customary international law is purpose. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). The Rome Statute, however, does not supersede or restrict existing customary international law. It was drafted for a specific and unique court and resulted from a series of political compromises. Not every provision was intended to reflect customary international law and, accordingly, it expressly states that its provisions should not be read to limit international law. Additionally, the ICC has yet to interpret the particular provision relied upon by the Second Circuit and could reasonably read it to require a knowledge standard. The ambiguity in the Statute affirms that it cannot offer dispositive evidence of a purpose *mens*

rea in customary international law, especially when decades of jurisprudence apply a knowledge standard. Moreover, for group crimes such as those at issue here, the Statute itself expressly provides a knowledge standard, which the court below failed to recognize. Thus, the Second Circuit fundamentally misunderstood the parameters of the Rome Statute and customary international law, and therefore adopted the wrong *mens rea* standard for aiding and abetting liability.

The petition for certiorari raises exceptionally important questions about the scope of liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, after *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Specifically, it presents the question of the proper *mens rea* standard for aiding and abetting liability, which continues to divide and confuse the lower courts. The standard adopted by the Second Circuit would contravene the text, history, and purpose of the ATS by effectively granting immunity to those who knowingly assist egregious human rights violations. Moreover, the approach of the court below is inconsistent with numerous other federal and international decisions adopting a knowledge standard, and would have significant national and international repercussions if allowed to stand. This Court should grant certiorari to clarify that under well-established customary international law, the *mens rea* standard for aiding and abetting liability is knowledge.

ARGUMENT

I. CUSTOMARY INTERNATIONAL LAW REQUIRES ONLY THAT AN AIDER AND ABETTOR ACT WITH THE *MENS REA* OF KNOWLEDGE

A. Nuremberg-era jurisprudence clearly establishes a knowledge standard for aiding and abetting liability

Post-World War II jurisprudence – from both national military courts and the Nuremberg Military Tribunals ("the NMT") – consistently applied a *mens rea* of knowledge for aiders and abettors. This Nuremberg-era jurisprudence informs current understandings of customary international law. The Second Circuit's reliance on a selective and erroneous reading of *United States v. Von Weizsaecker (The Ministries Case)*, 14 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 [Tr. War Crim.] 308 (1949), to establish a purpose requirement[3] threatens to undermine the legacy of Nuremberg and the well-recognized standard under customary international law.

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[3] In concluding that purpose was the proper standard, the Second Circuit did not consider the numerous cases discussed *infra* and instead relied exclusively on a misreading of Karl Rasche's acquittal in *Ministries*. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (characterizing acquittal as turning on *mens rea* rather than *actus reus*). *Ministries* is discussed in detail below.

A review of Nuremberg-era cases clearly demonstrates that knowledge was the applicable *mens rea* standard. For example, a British military court sentenced to death two industrialists who supplied poison gas to the Nazis because they "*knew* that the gas was to be used for the purpose of killing human beings." *Trial of Bruno Tesch and Two Others (The Zyklon B Case)*, 1 Law Reports of Trials of War Criminals 93, 101 (1947) (Brit. Mil. Ct., Hamburg, Mar. 1-8, 1946) (emphasis added); *see also Prosecutor v. Furundžija*, Case No. IT-95-17/1/T, Judgment, ¶ 238 (Dec. 10, 1998) (discussing *Zyklon B*). The purpose standard adopted by the court below – purportedly based on *Sosa* – would lead to the absurd result that these two industrialists, sentenced to death for their crimes, could not be held civilly liable under the ATS. Such a result starkly reinforces the need for this Court to grant certiorari to clarify the parameters of secondary liability under the ATS.

Also applying a knowledge standard, a German court in the French-occupied zone convicted several defendants of aiding and abetting the Gestapo's mass deportation of Jews. *LG Hechingen*, Kls 23/47, Justiz und NS-Verbrechen, Vol. 1, 471 (Lfd. Nr. 022) (June 28, 1947), *translated in Modes of Participation in Crimes Against Humanity*, 7 J. Int'l Crim. Just. 131 (2009). One government official was convicted because he "*knew* what act he was furthering by his participation . . . [and] he *knew* that through his participation he was furthering the principal act." *Id.* at 139 (emphasis added). The trial court found it immaterial

that the accused "regarded the Gestapo measures as 'unjust' to the Jews," because the *mens rea* for an accessory "does not . . . require the accused himself to have acted from racial considerations or from inhumane attitudes." *Id.*[4]

The NMT also applied a knowledge standard to defendants convicted under an aiding and abetting theory of liability. In *United States v. Flick*, 6 Tr. War Crim. 1187 (1947), the NMT convicted Friedrich Flick, a civilian industrialist, because he made vital financial contributions to the SS despite knowledge of their widespread abuses. The NMT noted that Flick "did not approve nor . . . condone the atrocities of the SS," *id.* at 1222, but found that "[o]ne who knowingly by his influence and money contributes to the support [of a violation of the law of nations] must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes," *id.* at 1217.

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[4] Although a reviewing court applied a different *mens rea* standard on appeal, *see OLG Tübingen*, ss 54/47, Justiz und NS-Verbrechen, Vol. 1, 494, 496-98 (Jan. 20, 1948), *translated in Modes of Participation in Crimes Against Humanity*, 7 J. Int'l Crim. Just. 148, 149-51 (2009), the International Criminal Tribunal for the Former Yugoslavia ("ICTY") cited with favor the *mens rea* applied by the trial court and held that "the high standard" imposed by the appellate court "is not reflected in other cases" and thus not indicative of customary international law. *Furundžija* ¶¶ 240 n.261, 248. The ICTY followed the well-established principle that a single deviation from a long line of precedent does not modify customary international law. *See* Restatement (Third) of Foreign Relations §§ 102(2), 102 cmt. (b) (1987).

In *United States v. Ohlendorf (The Einsatzgruppen Case),* 4 Tr. War Crim. 411 (1948), the NMT again applied a knowledge *mens rea* standard. Waldemar Klingelhoefer held a variety of roles, including that of an interpreter. He was convicted of crimes against humanity and war crimes. The NMT noted that even if Klingelhoefer had only acted as an interpreter, he would still be criminally liable "as an accessory" because "in locating, evaluating and turning over lists of Communist party functionaries to the executive department of his organization he was *aware* that the people listed would be executed when found." *Id*. at 569 (emphasis added).

Consistent with its reasoning in *Flick* and *Einsatzgruppen*, the NMT reinforced in *Ministries* that the appropriate *mens rea* standard across all relevant theories of criminal liability was knowledge. When examining defendants Von Weizsaecker and Woermann's criminal liability for the deportation of Jews, the NMT explained that they "neither originated [the deportation program], gave it enthusiastic support, nor in their hearts approved of it. The question is whether they knew of the program and whether in any substantial manner they aided, abetted, or implemented it." *Ministries* at 478; *see also id.* at 953 (reiterating on appeal that "inner disapproval is not a defense" for aiding and abetting liability).[5]

[5] The NMT also convicted banker Emil Puhl because he "*knew* that what was to be received and disposed of was stolen property and loot taken from the inmates of concentration

(Continued on following page)

Acquittals of alleged aiders and abettors in *Ministries* and other Nuremberg-era cases are also consistent with a knowledge standard. When national military courts and the NMT declined to convict under an aiding and abetting theory, they did so either because the defendant's actions failed to meet the *actus reus* requirement or because the defendant lacked the requisite *mens rea* of knowledge.

Some Nuremberg-era defendants were acquitted on charges of aiding and abetting because they did not possess the necessary *mens rea*. Courts did not acquit because defendants lacked the purpose of facilitating a crime, but rather because they lacked knowledge of the consequences of their assistance. For example, a British military court acquitted defendants Karl Brendle and Eugen Rafflenbeul who, as drivers, substantially assisted other defendants who executed three Allied airmen. *Trial of Franz Schonfeld and Nine Others*, 11 Law Reports of Trials of War Criminals 64, 66-67 (Brit. Mil. Ct., Essen, June 11-26, 1946). Brendle and Rafflenbeul claimed not to have known the aim of the mission and the court acquitted because "[d]espite having made a physical contribution to the commission of the offence, they had no knowledge that they were doing so." *Furundžija* ¶ 239 (discussing *Schonfeld*).

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camps." *Ministries* at 620 (emphasis added). The Tribunal disavowed a purpose standard, noting that, "[Puhl] neither originated the matter and that it was probably repugnant to him." *Id.* at 620-21.

In *United States v. Krauch (The I.G. Farben Case)*, 8 Tr. War Crim. 1081 (1948), the NMT found that the chemical corporation Degesch, controlled by I.G. Farben, had supplied large quantities of gas used to exterminate concentration camp inmates. In contrast to the defendants in *Zyklon B*, the I.G. Farben executives believed the gas was used to delouse prisoners and did not have "any significant knowledge as to the uses to which its production was being put." *Id.* at 1169. Similarly, although I.G. Farben executives provided anti-typhus drugs used in medical experiments on concentration camp inmates, the NMT was not persuaded that they had the requisite "guilty knowledge" of the Nazis' intentions. *Id.* at 1171-72 (finding it reasonable to believe that there was a "legitimate need for such drugs in these institutions"). The NMT's acquittals in these cases demonstrate that a purpose standard was not applied in Nuremberg-era jurisprudence.

In *Ministries*, the NMT's acquittal of Karl Rasche on some counts hinged on the failure of his actions to meet the *actus reus* requirement. It was on Rasche's acquittal alone that the Second Circuit rested its erroneous conclusion that "international law at the time of the Nuremberg trials recognized aiding and abetting liability only for purposeful conduct." *Talisman*, 582 F.3d at 259 (citing *Ministries* at 662 [sic]). Rasche, a bank director, was alleged to have participated in making loans to support both slave labor and "so-called re-settlement programs." *Ministries* at 621. Noting that a "bank sells money or credit in the same manner as the merchandiser of any other commodity,"

id. at 622, the NMT held that the act of loan-making was insufficient to impose criminal liability under international law.[6] Like "one who sells supplies or raw materials to a builder building a house," a bank, in making a loan, "does not become a partner in enterprise." *Id.* Thus, Rasche's acquittal resulted from inadequate evidence to establish the *actus reus*, not a *mens rea* of purpose.[7]

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[6] The NMT held:

> Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, *but the transaction can hardly be said to be a crime*. Our duty is to try and punish those guilty of violating international law, and *we are not prepared to state that such loans constitute a violation of that law*, nor has our attention been drawn to any ruling to the contrary.

Ministries at 622 (emphasis added). *See also id.* at 784, 854 (twice reiterating that Rasche's *loan-making* did not constitute criminal conduct).

[7] After concluding that Rasche had knowledge of the loans' use, the Tribunal stated that the "[t]he real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law?" *Ministries* at 622. The question is conjunctive, containing both an *actus reus* component (making a loan) and a *mens rea* component (with knowledge that the loan will be used to finance an illicit purpose). Because the Tribunal ultimately acquitted Rasche on this count (answering the conjunctive question in the negative), the Second Circuit concluded that a *mens rea* of knowledge was insufficient. It should be apparent, however, that this is not a necessary conclusion, as the acquittal was based on an insufficient *actus reus*.

Post-World War II jurisprudence reflects consistent application of a knowledge standard for aiding and abetting liability. Ignoring the repeated adoption of this standard, the court below relied exclusively on one acquittal in *Ministries* to support its erroneous assertion that Nuremberg-era tribunals applied a purpose standard. This distortion of the case law would effectively rewrite established jurisprudence. This Court should grant certiorari to preserve the Nuremberg legacy and address a question of national and international importance: whether those responsible for the most serious violations will continue to be held accountable under customary international law's well-established knowledge *mens rea* standard.

B. The international criminal tribunals have affirmed and consistently applied a knowledge standard as customary international law

Applying Nuremberg-era jurisprudence, the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") have repeatedly adopted a knowledge standard. The ICTY is "only empowered to apply" standards that are "beyond any doubt customary law." *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 662 (May 7, 1997) (citation omitted). ICTY judgments are accorded "substantial weight" in determining the content of customary international law. Restatement (Third) of Foreign Relations §103(2)(a) (1987). Indeed, "[t]he fact that

the law applied by the *ad hoc* Tribunals is more than mere statutory law gives their pronouncements particular authority and resonance outside of The Hague and Arusha courtrooms." Guénaël Mettraux, *International Crimes and the* ad hoc *Tribunals* 12 (2005). Decisions of the ICTY and ICTR are "especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to the [ATS]." *Doe v. Unocal*, 395 F.3d 932, 950 (9th Cir. 2002), *vacated by grant of en banc review*, 395 F.3d 978 (9th Cir. 2003). *See also Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 274 (2d Cir. 2007) (Katzmann, J., concurring) (noting that ICTY Statute is a "particularly significant" source "intended to codify existing norms of customary international law").

In its first judgment, the ICTY found a "clear pattern" in post-World War II case law requiring a *mens rea* of knowledge. *Tadić* ¶ 674; *see also id*. ¶ 692 ("[T]he accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law."); *see also Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶¶ 325-29 (Nov. 16, 1998) (agreeing with conclusions of the "detailed investigation" in the *Tadic´* judgment). In *Furundžija*, the ICTY again conducted an exhaustive analysis of Nuremberg-era jurisprudence, concluding:

> [I]t is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of [Nuremberg-era] cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime.

Furundžija ¶ 245.

The ICTY has systematically reaffirmed this standard at both the trial and appellate levels, even after the adoption of the Rome Statute of the International Criminal Court ("ICC"), July 17, 1998, 2187 U.N.T.S. 3. *See, e.g.*, *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Judgment, ¶ 127 (May 9, 2007); *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgment, ¶ 86 (Nov. 28, 2006); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶ 50 (July 29, 2004); *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004); *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶ 51 (Sept. 17, 2003) (noting "no cogent reason" to amend knowledge standard); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 229(iv) (July 15, 1999); *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Judgment, ¶ 94 (Feb. 26, 2009); *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 392 (Feb. 22, 2001).

The ICTR has applied a knowledge standard. *See, e.g.*, *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-A, Judgment, ¶ 122 (Jan. 16, 2007); *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-A, Judgment,

¶ 370 (July 7, 2006); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment, ¶ 180 (Jan. 27, 2000); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 545 (Sept. 2, 1998).

The Special Court for Sierra Leone ("SCSL") also has applied a knowledge standard. *See*, *e.g.*, *Prosecutor v. Brima,* Case No. SCSL-04-16-A, Judgment, ¶¶ 242-43 (Feb. 22, 2008) (adopting Trial Chamber's conclusion that "[t]he *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would [do so]."); *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, ¶ 280 (Mar. 2, 2009); *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment, ¶ 231 (Aug. 2, 2007).

This consistent and extensive line of cases from the ICTY, the ICTR, and the SCSL that have been mandated to apply customary international law confirms a knowledge *mens rea* standard for aiding and abetting liability. The implications of the Second Circuit's purpose standard are deeply problematic: the standard used to convict *génocidaires* and war criminals at the modern criminal tribunals would be insufficient to impose civil liability under the ATS.[8]

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[8] One defendant convicted of crimes against humanity at the ICTY has already mounted an appeal based on the Second Circuit's flawed logic. *See* General Ojdanić's Amended Appeal Brief, Case No. IT-05-87-A, ¶ 280 (Dec. 11, 2009); *see also*

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II. THE ROME STATUTE DOES NOT ALTER ESTABLISHED CUSTOMARY INTERNATIONAL LAW OR DICTATE A *MENS REA* OF PURPOSE

The use of the word "purpose" in the Rome Statute (regardless of how it is eventually interpreted by the ICC) does not alter the knowledge *mens rea* standard affirmed through sixty years of customary international law. Interpretation of customary international law requires consulting a multitude of sources, not a single case or statute.[9] The Rome Statute is not a dispositive source of customary international law because: (1) it was drafted for a specific and unique court and resulted from political compromise; (2) not every provision was intended to reflect customary international law; and (3) insofar as the ICC might construe the Statute to include a purpose standard, such a standard would derogate from established international law. Moreover, the provision of the Statute relied upon by the Second Circuit is ambiguous, which affirms that it does not offer authoritative evidence of the *mens rea* standard under

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General Ojdanić's Reply to the Prosecution's Response to His Second Motion to Amend His Notice of Appeal, Case No. IT-05-87-A, ¶ 12 (Oct. 15, 2009) (seeking to amend challenge to conviction based on Second Circuit's "recent and unequivocal holding as to the content of customary international law").

[9] The Rome Statute is one source but is "not dispositive and do[es] not override the cumulative weight of other evidentiary sources." Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 Hastings L.J. 61, 88 (2008).

customary international law. The ICC has yet to interpret this provision and could reasonably read it as more akin to knowledge than to purpose. Furthermore, the court below ignored the Statute's group crimes provision, which is relevant to this case and contains an explicit knowledge standard. To derive a purpose standard under these circumstances based on one article of the Rome Statute would thus conflict with well-established customary international law.

A. The Rome Statute does not supersede or restrict customary international law

The Rome Statute established a unique court with a specific mandate and limited jurisdiction to hold individuals criminally responsible for egregious crimes. The Statute emerged from a political process: states made a "collection of compromises" rather than analyzing existing customary international law to reach agreement on its provisions. Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* 263 (2002).

The Rome Statute was "never intended, in its entirety, to reflect customary international law." Brief of David J. Scheffer as *Amicus Curiae* in Support of Petitioner and Rehearing en banc at 2, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016-cv (2d Cir. Oct. 28, 2009) [hereinafter Scheffer

Brief].[10] Specifically, Article 25(3)(c), implicitly relied upon by the court below to establish a purpose standard for aiding and abetting liability, *Talisman*, 582 F.3d at 259, was never understood to reflect customary international law. Article 25(3)(c)'s "purpose" language was the result of political negotiations, not a codification of international law. Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U. J. Int'l Hum. Rts. 304, 310-11 (2008); *see also* M. Cherif Bassiouni, 2 *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* 194-98 (2005) (showing that until the Rome Conference, every proposed draft included "intent" and "knowledge" in brackets); *see also* Scheffer Brief, *supra*, at 4.

Provisions of the Rome Statute that deviate from customary international law concern the ICC alone and do not reflect a collective decision of the drafters to alter or restrict well-established custom. Article 10, which provides that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute," underscores the "wish to preserve the role of custom in the

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[10] For example, since the Rome Statute does not recognize claims of sovereign immunity, *see* art. 27, the Statute's drafters "might have set the bar to criminal liability higher than the current state of customary international law, which the Rome Statute does not purport to reflect." Keitner, *supra* note 9, at 88.

development of normative standards of conduct in the area of international criminal justice," Leila Nadya Sadat, *Custom, Codification and Some Thoughts about the Relationship Between the Two: Article 10 of the ICC Statute*, 49 DePaul L. Rev. 909, 912 (2000). Similarly, Article 22(3) notes that the Statute's definition of crimes "shall not affect the characterization of any conduct as criminal under international law independently of this Statute." These articles evidence the drafters' intent to ensure the preservation and development of customary international law independent of the Statute.

The ICC Pre-Trial Chamber has itself recognized the distinctive nature of the Rome Statute and articulated that, at times, the Statute clearly breaks from custom. *See, e.g.*, *Prosecutor v. Katanga*, ICC-01/04-01/07, Pre-Trial Chamber I Decision on the Confirmation of Charges, ¶ 508 (Sept. 30, 2008) (noting that when the Statute expressly provides a mode of liability, the Statute is determinative, and "the question as to whether customary law admits or discards [that liability] is not relevant for this Court"). To the extent that the ICC might interpret the Rome Statute to require a purpose standard, that deviation would not alter the well-settled *mens rea* of knowledge. *See, e.g.,* Paola Gaeta, *Official Capacity and Immunities*, *in* 1 *The Rome Statute of the International Criminal Court: A Commentary* 982, 989 (Antonio Cassese ed., 2002). Thus, because the Rome Statute generally, and Article 25(3)(c) specifically, do not reflect or constrain customary international law, Article 25(3)(c) is not

determinative in an analysis of the proper *mens rea* standard for aiding and abetting liability.

B. The Rome Statute's *mens rea* for aiding and abetting liability remains ambiguous and could reasonably be interpreted by the ICC to reflect a knowledge standard consistent with customary international law

The *mens rea* standard for aiding and abetting liability in the Rome Statute has "yet to be construed by the [ICC]," so "[the Statute's] precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain." *Khulumani*, 504 F.3d at 275-76 (Katzmann, J., concurring). The court below implicitly relied on Article 25(3)(c) to determine that the Rome Statute requires a purpose standard, yet the meaning of this article remains ambiguous. The Statute never defines "purpose" and the legislative history provides no guidance to interpret this provision.[11] The drafters

[11] The Rome Statute certainly does not require specific intent for aiding and abetting liability. Where the Statute requires specific intent, it is explicitly enumerated as an element of the offense. *See, e.g.*, art. 6 ("with intent to destroy"); *see also* Donald K. Piragoff and Darryl Robinson, *Article 30: Mental Element*, *in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 857-58 (Otto Triffterer ed., 2008). Nevertheless, some courts have relied on the Statute and the Second Circuit's decision to impose a specific intent requirement for aiding and abetting allegations in ATS cases. *See, e.g., Doe v. Drummond Co., Inc.*, No. 08-01041-cv, slip op. at

(Continued on following page)

left elaboration of "soliciting, aiding, abetting, inciting or attempting" offenses for the ICC to determine in particular cases. Maria Kelt and Herman von Hebel, *General Principles of Criminal Law and the Elements of Crimes*, *in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* 37 (Roy Lee ed., 2001).

The ICC has yet to resolve the interplay of Article 25(3)(c) with other provisions. First, under Article 25(3)(d)(ii), knowledge is the explicit standard of liability for group crimes: an actor who "contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" is liable if he made the contribution "in the *knowledge* of the intention of the group to commit the crime." Rome Statute art. 25(3)(d)(ii) (emphasis added). Such group crimes are often the subject of ATS cases, including this one. The court below erred in not considering this article or form of liability. Second, the ICC could reasonably read Article 25(3)(c) to require a knowledge *mens rea*, as the meaning of Article 25(3)(c) should not be determined in isolation. Article 30 establishes a general *mens rea* for criminal liability of "intent and knowledge." This general intent requirement can be met by showing that an individual is "*aware* that [the consequences] will occur

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17 (N.D. Ala. Nov. 9, 2009) (holding that plaintiff must allege that defendant "*intended to assist* with the specific 67 murders alleged in the complaint") (emphasis in original).

in the ordinary course of events." Rome Statute art. 30(2)(b) (emphasis added). Article 25 should be interpreted in light of these other provisions. *See, e.g.*, Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offenses*, 12 Crim. L. Forum 291, 319 n.98 (Sept. 2001).

Given the interplay of these provisions, the standard for aiding and abetting liability under the Rome Statute could reasonably be read to require knowledge. This unresolved ambiguity affirms that the Statute itself does not offer authoritative evidence of the *mens rea* under customary international law. Moreover, where there is ambiguity, the ICC has indicated that it will consult rules of international law as a persuasive "secondary source" for interpreting the Statute. *Katanga* ¶ 508; *see also* Gerhard Werle, *Principles of International Criminal Law* 108-09 (2005) (stating that to the extent any ambiguities arise in the Rome Statute, these should be resolved to be consistent with customary international law). Customary international law adopts a knowledge standard, which will inform the ICC's interpretation of ambiguous provisions regarding the *mens rea* for aiding and abetting.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT CUSTOMARY INTERNATIONAL LAW CONTAINS A KNOWLEDGE *MENS REA* STANDARD AND TO PROVIDE NECESSARY GUIDANCE TO THE LOWER COURTS

This case raises exceptionally important issues about the scope of liability under the ATS after *Sosa*. It presents the question of the proper standard for aiding and abetting liability, which continues to divide the lower courts. This standard is of vital importance for plaintiffs, defendants, and governments who take an interest in ATS litigation. The case thus raises crucial issues – requiring this Court's immediate attention – about the interpretation and application of the aiding and abetting standard. The holding of the court below – that the *mens rea* for aiding and abetting liability under customary international law is purpose – threatens to undermine the scope of liability analysis outlined in *Sosa*. The Second Circuit's decision conflicts with established customary international law from the Nuremberg era to the present as well as the holdings of other circuits. This Court should clarify that under customary international law the standard for aiding and abetting liability is knowledge and thereby offer necessary guidance to the lower courts on an issue that continues to confuse and divide them.

This conclusion is bolstered by the fact that experts have voiced particular concern about the decision of the court below. John Ruggie, United Nations

Special Representative to the Secretary-General for Business and Human Rights, has singled out the purpose *mens rea* adopted by the Second Circuit as "absurd":

> as long as an I.G. Farben intended only to make money, not to exterminate Jews, it would make it permissible for such a company to keep supplying a government with massive amounts of Zyklon B poison gas knowing precisely what it is used for.

John Ruggie, Remarks Prepared for International Commission of Jurists Access to Justice Workshop, Johannesburg, South Africa (Oct. 29, 2009) (transcript at www.business-humanrights.org). Ruggie, who has studied this issue for years under his mandate, concluded that "[a]doption of such a standard goes against the weight of international legal opinion." *Id.* Indeed, the standard is knowledge, consistent with the overwhelming body of customary international law.

Allowing the Second Circuit's decision to stand would have drastic and far-reaching implications. First, to abandon knowledge as the *mens rea* standard would contradict the history and aims of international criminal law: to hold accountable perpetrators of the most egregious violations. The knowledge standard recognized at Nuremberg and faithfully adhered to in intervening decades brought justice for heinous crimes. However, under the Second Circuit's misinterpretation of customary international law, the validity of the convictions of industrialists sentenced for

aiding and abetting the Holocaust, as well as war criminals and *génocidaires* sentenced by the modern international criminal tribunals, would be called into question. Moreover, the Second Circuit's decision could lead to the unacceptable result that the modern-day equivalent of Zyklon B industrialists could be held criminally liable but escape civil liability under the ATS.

Second, reading any standard other than knowledge into customary international law risks imposing that standard more broadly, beyond the ATS context. For example, it may become significantly more difficult to hold those who aid and abet terrorists liable, even when they have knowledge of a terrorist group's intent to commit a bombing and contribute by supplying explosives or funds. *See Abecassis v. Wyatt*, No. 09-03884-cv, slip op. at 51 (S.D. Tex. Mar. 31, 2010) (dismissing complaint because allegations did not meet the *Talisman* standard and stating that "[t]he allegation would have to be that the defendants acted with the purpose of assisting terrorists to murder or mai[m] innocent civilians"); *see also* Cassel, *supra*, at 313-14 (referring to the application of art. 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249, 2149 U.N.T.S. 256).

Sixty years of established international law consistently applies a knowledge *mens rea* for aiding and abetting liability. Customary international law is born of enduring state practice and international agreement; it must not be recast through selective

analysis and misinterpretation. Review is necessary to prevent the court below from distorting post-World War II jurisprudence and the body of law it fostered at the *ad hoc* international criminal tribunals. The consequences to customary international law of the Second Circuit's erroneous adoption of a purpose standard are too severe for this Court not to intervene.

CONCLUSION

For the above reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

LIST OF *AMICI CURIAE*[1]

William Aceves

Professor Aceves is the Associate Dean for Academic Affairs and a Professor of Law at California Western School of Law. He publishes extensively in the fields of human rights and international law. In 2006-2007, Aceves served as the co-chair for the 101st Annual Meeting of the American Society of International Law. He has appeared before the Inter-American Commission on Human Rights, the United Nations Special Rapporteur on Migrants, and the United States Commission on Civil Rights.

Philip Alston

Professor Alston is the John Norton Pomeroy Professor of Law and Chair of the Center for Human Rights and Global Justice at New York University School of Law. He teaches international law and has published widely on international law and human rights, including co-authoring a leading textbook in this field. Alston has held a range of senior United Nations appointments for well over two decades, including, since 2004, United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions.

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[1] Affiliations are provided for identification purposes only.

M. Cherif Bassiouni

Professor Bassiouni is a Distinguished Research Professor of Law Emeritus at DePaul University College of Law and President Emeritus of the law school's International Human Rights Law Institute. He has served the United Nations in a number of capacities, including as Vice-Chairman of the General Assembly's Ad Hoc and Preparatory Committees on the Establishment of an International Criminal Court and Chairman of the Drafting Committee of the 1998 Diplomatic Conference on the Establishment of an International Criminal Court. He has authored numerous books and articles in the fields of international criminal law, comparative criminal law, and international human rights law.

Douglass Cassel

Professor Cassel is the Lilly Endowment Professor of Law at Notre Dame Law School and Director of its Center for Civil and Human Rights. He is a member of the Executive Council of the American Society of International Law and served as a consultant to the American Bar Association President on the International Criminal Court. He has also served as president of international organizations assisting justice reform in the Americas, and has been a consultant on human rights to numerous non-governmental organizations as well as to the United Nations, the Organization of American States, and the United States Department of State. He has published widely

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Professor Clark is the Board of Governors Professor at Rutgers University School of Law. He was a member of the United Nations Committee on Crime Prevention and Control from 1986-1990, and has authored or co-authored numerous articles and books on international law. He participated in the negotiations to create the International Criminal Court and has been active in the Court's Working Group.

David M. Crane

Professor Crane is a Professor of Practice at the College of Law, Syracuse University. From 2002-2005, he was the founding Chief Prosecutor of the Special Court for Sierra Leone, appointed to that position by the Secretary-General of the United Nations. Professor Crane was the first American since Justice Robert Jackson and Telford Taylor at Nuremberg to be the Chief Prosecutor of an international war crimes tribunal. Professor Crane previously served over thirty years in the United States government.

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Professor Dugard is a Professor of International Law at the Centre for Human Rights, University of

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Richard Goldstone

Professor Goldstone is a former South African Constitutional Court justice, and served as the first Chief Prosecutor of the United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda. He also served as chairperson of the International Task Force on Terrorism for the International Bar Association. Among other academic positions, he has been the Henry Shattuck Visiting Professor Law at Harvard Law School, a Global Visiting Professor of Law at New York University School of Law, and both the William Hughes Mulligan and Bacon-Kilkenny Distinguished Visiting Professor of Law at Fordham Law School.

Ved Nanda

Professor Nanda is the John Evans University Professor, Thompson G. Marsh Professor of Law, and Director of the International Legal Studies Program at the University of Denver, Sturm College of Law. He is Past President of the World Jurist Association,

and former honorary Vice President of the American Society of International Law. He currently serves as Honorary President of the World Jurist Association and Honorary Vice-President of the International Law Association, American Branch. He was formerly the United States Delegate to the World Federation of the United Nations Associations, Geneva, Vice-Chair of its Executive Council, and on the Board of Directors of the United Nations Association of the United States of America.

Sheri Rosenberg

Professor Rosenberg is a Professor of Clinical Law and Director of the Program in Holocaust and Human Rights Studies, as well as Director of the Human Rights and Genocide Clinic, at the Benjamin M. Cardozo School of Law. She has worked in the areas of civil rights and international human rights with a specific focus on issues of discrimination, equality, and genocide. In 2000, Professor Rosenberg was one of two United States lawyers to work for the Human Rights Chamber, a quasi-international court established under the Dayton Peace Agreement in Bosnia and Herzegovina.

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Professor Sadat is the Henry H. Oberschelp Professor of Law and Director of the Whitney R. Harris World Law Institute at the Washington University School of Law. She is an internationally recognized authority

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Ms. Sellers is a Fellow at Kellogg College, Oxford University and an independent Legal Consultant in international criminal law and humanitarian law. She served as Legal Advisor for Gender-Related Crimes and Acting Senior Trial Attorney for twelve years at the International Criminal Tribunal for the Former Yugoslavia, including from 1998-2002 as Deputy Head of the Legal Advisory Section.

Dinah Shelton

Professor Shelton is the Manatt/Ahn Professor of International Law at the George Washington University Law School. She has authored numerous articles and books on international law, human rights law, and international environmental law. She is a member of the board of editors of the American Journal of International Law and is a Vice-President of the American Society of International Law. She has served as a legal consultant to the United Nations Environment Programme, United Nations Institute of Training and Research, World Health Organization, European Union, Council of Europe, and Organization of American States.

Beth Stephens

Professor Stephens is Professor of Law at Rutgers University School of Law. She has published a variety of articles and books on the relationship between international and domestic law, focusing on the enforcement of international human rights norms through domestic courts. In 1995, Professor Stephens received the Trial Lawyer of the Year Award from Trial Lawyers for Public Justice in recognition of her work litigating international human rights claims.

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Professor Van Schaack is Associate Professor of Law at Santa Clara University School of Law. She teaches and publishes in the fields of international law, international criminal and humanitarian law, and human rights. She worked in the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia from 1997-1998, and has served as Legal Advisor to the Documentation Centre of Cambodia since 1996.

David Weissbrodt

Professor Weissbrodt is Regents Professor and Fredrikson & Byron Professor of Law at the University of Minnesota Law School. He is a distinguished and widely published scholar of international human rights law. From 1996-2003, he served as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights and was

elected Chairperson of the Sub-Commission from 2001-2002. He was also designated the United Nations Special Rapporteur on the Rights of Non-Citizens from 2000-2003. In 2005, he was selected as a member of the Board of Trustees of the United Nations Trust Fund for Contemporary Forms of Slavery, and in 2008 he was elected Chairperson of the Board.